Supreme Court, U.S.
FILED

971481 MAR 10 1998

OFFICE OF THE CLERK

No.97-

In The
Supreme Court of the United States

October Term, 1997

LIBERTY NATIONAL LIFE INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

SAMUEL L. DAY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

PEYTON LACY, JR.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1900 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 328-1900

48 pp

QUESTION PRESENTED

Whether a United States District Court has discretion, under any circumstances, to consider a valid affirmative defense which is raised after trial but before entry of judgment?

LIST OF PARTIES

Petitioner, Liberty National Life Insurance Company is controlled by its parent corporation, Torchmark Corporation. Petitioner and its parent have one subsidiary which is nonwholly owned, which is Waddell and Reed Financial, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....2

STATUTES INVOLVED.....3

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING WRIT.....6

I. The Eleventh Circuit's Opinion Reflects a Clear and Substantial Departure From the Accepted and Usual Course of Judicial Proceedings as Acknowledged by This Court.....7

II. There is a Split Between The Circuits Regarding the Articulated Rule for the Degree of Deference Afforded a Trial Court to Consider a Belatedly Raised Affirmative Defense.....12

CONCLUSION.....16

APPENDIX A.....1a

Opinion of the United States Court of Appeals For the Eleventh Circuit, filed September 22, 1997

APPENDIX B.....10a

Memorandum Opinion and Order of the United States District Court for the Northern District of Florida, entered Jun 12, 1996

APPENDIX C.....18a

Orders of the United States Court of Appeals for the Eleventh Circuit Respecting Petitioner's Petition for Rehearing, filed December 10, 1997

APPENDIX D.....21a

Plaintiff's Complaint, filed April 29, 1994

TABLE OF AUTHORITIES

CASES

Blaney v. United States, 34 F.3d 509 (7th Cir. 1994).....14

Browning v. AT&T Paradyne, 120 F.3d 222 (11th Cir. 1997).....12

Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993).....14

Conley v. Gibson, 355 U.S. 41 (1957).....15

Emich Motors Corp. v. General Motors Corp., 229 F.2d 714 (7th Cir. 1956).....14,15

Garfield v. J. C. Nichols Real Estate, 57 F.3d 662 (8th Cir. 1995), *cert. denied*, ___U.S.___, 116 S.Ct. 380, 133 L.Ed. 2d 303 (1995).....12

Harris v. Secretary, U.S. Department of Veterans Affairs, 126 U.S. 339 (D.C. Cir. 1997).....13

Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027.....10,11

Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1374 (3rd Cir. 1993).....14

Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993).....14

Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979).....13

Phelps v. McClellan, 30 F.3d 658, 662-3, (6th Cir. 1994).....14

St. Louis v. Texas Worker's Compensation Commission, 65 F.3d 43 (5th Cir. 1995), *cert. denied*, ___U.S.___, 116 S.Ct. 2563, 135 L.Ed. 2d 1080 (1996).....12

Vernon v. Cassadaga Valley Central School District, 49 F.3d 886 (2nd Cir. 1995).....12

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 329-32 (1974).....7-11, 15

Zotos v. Lindbergh School District, 121 F.3d 356 (8th Cir. 1997).....12

STATUTES

28 U.S.C. § 1331.....4

29 U.S.C. § 255.....11

29 U.S.C. § 626(e).....3,11

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq*.....2,3

Portal-to-Portal Pay Act of 1947, 29 U.S.C. § 251, *et seq*.....2,12

No.

In The

Supreme Court of the United States

October Term, 1997

LIBERTY NATIONAL LIFE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

SAMUEL L. Day,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Liberty National Life Insurance Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 122 F.3d 1012 (1997) and is reproduced in the Appendix filed herewith at 1a. The unreported opinion of the District Court in this case is reproduced as Appendix B at 10a of the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 22, 1997. Petitioner timely filed a petition for rehearing with the Eleventh Circuit, which petition was denied on December 10, 1997. Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 255(a) of the Portal-to-Portal Pay Act of 1947, as amended, 29 U.S.C. § 251 *et seq.*, provides in pertinent part:

> § 255(a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

Prior to the enactment of the Civil Rights Act of 1991 on November 21, 1991, § 626(e)(1) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA") incorporated the above-quoted statute of limitations, providing:

> (e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling
>
> (1) Sections 255 and 259 of this title shall apply to actions under this chapter.

Since November 21, 1991, 29 U.S.C. §626(e) has provided as follows:

> § 626(e) Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

STATEMENT OF THE CASE

Respondent, Samuel L. Day (hereinafter "Day" or "Respondent"), was terminated from his employment with Petitioner, Liberty National Life Insurance Company (hereinafter "Liberty National" or "Petitioner"), in May, 1991. On October 8, 1991, Respondent filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). Subsequently, in response to Day's charge of discrimination, Day received a determination letter which indicated that he had two years from the date of the last discriminatory act to bring suit for any unintentional violation of the ADEA and three years from the time of the last discriminatory act to bring suit for a willful violation of the ADEA.

More than two years but less than three years after

Respondent was terminated, he brought this ADEA lawsuit in the United States District Court for the Northern District on Florida.[1] Subject matter jurisdiction in the district court was proper under 28 U.S.C. § 1331.

In his complaint, Respondent explicitly and affirmatively asserted that the lawsuit was brought within the three-year statute of limitations which applied to willful violations of the ADEA. The complaint provides in pertinent part:

> Plaintiff received a determination three days before his two year statute expired stating that he had three years to file a lawsuit. Plaintiff brings this lawsuit within three years of the discriminatory discharge to challenge intentional and willful violations of the Age Discrimination and [sic] Employment Act.

Appendix D at 22a-23a (¶ 2). Liberty National did not explicitly raise or affirmatively plead a statute of limitations defense prior to trial.

Following an initial trial which resulted in a deadlocked jury and a mistrial, the case was tried for a second time and submitted to a second jury. That jury made two findings. First, the jury found that age was a determining factor in the Respondent's termination. Second, the jury found that Petitioner's violation of the ADEA was not "willful". The jury assessed Respondent's damages as a result of the non-willful

---

1. Respondent's last day of employment with Liberty National was May 8, 1991. The complaint was filed nearly three years later, on April 29, 1994.

violation of the ADEA at $300,000.00.

Based upon the jury's finding of no willfulness, Liberty National raised the statute of limitations as a bar to recovery. This argument was broached with the trial court after the jury returned its verdict, but before the entry of judgment. The court requested the parties to brief the statute of limitations issue, but, while the parties were preparing their briefs in this regard, the clerk of the court entered judgment on the jury's verdict in the amount of $300,000.00.

Liberty National timely moved the trial court to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) based upon the expiration of the two-year "non-willful" statute of limitations. Liberty National's motion to alter or amend was well-taken by the trial court, and on June 12, 1996 District Judge Roger Vinson entered a memorandum opinion and order granting Liberty National's motion to alter or amend and directing the clerk to enter judgment in favor of Liberty National. Appendix B. Judge Vinson's memorandum opinion and order expressly addressed the fact that Liberty National did not affirmatively plead a statute of limitations defense in its answer or raise the issue prior to trial. Appendix B at 12-13a. The court pointed out that Respondent himself interjected the statute of limitations issue in the complaint by acknowledging the applicability of the three-year statute of limitations for willful violations of the ADEA. *Id.* In this light, Judge Vinson found that Day was not prejudiced by any failure to plead, and the court exercised its discretion to consider the statute of limitations defense. *Id.*

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the trial court and ordered the reinstatement of the jury's verdict. Appendix A. The court

held that the trial court abused its discretion in granting Petitioner's motion to alter or amend the judgment. The appellate court's reasoning hinged on the premise that Liberty National had waived its statute of limitations defense by failing to affirmatively plead that defense. The court of appeals did not acknowledge or address the trial court's discretion to consider a valid affirmative defense that is belatedly raised.

REASONS FOR GRANTING WRIT

This Court should grant the writ of certiorari in this case in its supervisory role over the federal judiciary. This case goes to the structural roots of all judicial proceedings — the trial court's ability and discretion to control the course of proceedings before it. The Eleventh Circuit's Opinion in this case reflects a substantial encroachment on the district courts' ability to control the course of litigation at the trial level. The Eleventh Circuit invaded the province of its trial courts by reinstating a jury verdict which the district court had discarded due to a valid, albeit belatedly raised statute of limitations defense, without any consideration for the trial court's discretion to consider the valid defense. Moreover, a survey of opinions from the various circuits reveals the need for this Court's guidance with regard to the ability of the courts to consider a belatedly raised defense. There is a split of authority in the manner with which the circuits treat this issue, ranging from opinions that recognize the trial courts' broad discretion to hear belatedly raised defenses to opinions which apply a *per se* rule that a failure to timely plead a valid affirmative defense results in the waiver of that defense.

I. The Eleventh Circuit's Opinion Reflects a Clear and Substantial Departure From the Accepted and Usual Course of Judicial Proceedings as Acknowledged by This Court.

A. This Court Has Explicitly Acknowledged the United States District Courts' Broad Discretion to Hear and Consider Belatedly Raised Affirmative Defenses.

The Eleventh Circuit Court of Appeal's opinion in this case strikes significant discord with this Court's opinion in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 329-32 (1974). In Zenith Radio, a Sherman Act case, Hazeltine Research Inc. ("HRI") raised a statute of limitations defense to a counterclaim by Zenith. As in the case at bar, the statute of limitations defense was not raised in the pleadings or prior to trial. Indeed, in Zenith Radio, the limitations defense was not asserted until a year after the close of evidence and after the trial court made its findings of fact. *Id.* at 323. Unlike the present case, the trial court in Zenith Radio rejected the belatedly raised defense.[2] While the end result of Zenith Radio was the rejection of the statute of limitations defense, this Court's analysis in reaching that conclusion clearly indicates the breadth of district courts' discretion to allow parties to assert defenses after the close of trial. To this end, the Court stated:

---

2. The trial court's opinion was unclear as to whether the trial court had rejected the statute of limitations defense on its merits or if the trial court had simply refused to allow HRI to belatedly raise the defense. *Id.* at 329. Because of this lack of clarity, the Supreme Court considered each of these alternatives.

> On the assumption that the trial court did hold the defenses of limitations and release to have been waived, we cannot say that the judge abused his discretion or stressed too much the value of avoiding reopening a trial to litigate matter that HRI had had an opportunity, but neglected, to litigate.

Id. at 332. Addressing the trial court's discretion to allow the belated defense this Court stated:

> It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. d. 2d 222 (1962)(dictum). In a matter as substantial and complex as this one where HRI claimed it had been misled or at the very least asked to be relieved of mistake or oversight, it might have been within the discretion of the trial judge to have permitted HRI to amend its pleadings to include therein the defenses of limitations and release. But, in deciding whether to permit such an amendment, the trial court was required to take into account any prejudice that Zenith would have suffered as a result . . .

Id. at 330-1. This Court went on to note that allowing the amendment under the circumstances of that case would have resulted in substantial prejudice to Zenith because it would

have necessitated a "virtual retrial of the issue of damages."[3] Even though permitting the belated defense in that context would have placed a heavy burden on Zenith, this Court noted that the trial court might have utilized its discretion to entertain the belatedly raised defense by reopening the case to allow additional proof required by the introduction of the statute of limitations issue. *Id.* at 331 ("The trial judge here might have permitted reopening. Like a motion under Rule 15(a) to amend the pleadings, a motion to reopen to submit additional proof is addressed to his sound discretion.").

Whereas in Zenith Radio this Court expressed the opinion that the trial court had broad discretion to decide whether or not to consider a statute of limitations defense that was not raised until over a year after trial, the Eleventh Circuit in the present case rebuked the trial court for exercising its discretion to consider a valid defense which was raised immediately upon the return of the jury's verdict.

B. The Eleventh Circuit Failed to Acknowledge the Trial Court's Discretion to Consider a Valid Affirmative Defense.

It bears emphasis that Eleventh Circuit Court of Appeals' opinion in this case does not merely reflect a misapplication of an appropriately stated standard of review. It is true that the Eleventh Circuit did state that it reviewed the district court's grant of Petitioner's Rule 59 motion to alter or amend the judgment for abuse of discretion. However, the

---

3. Unlike the present case, the statute of limitations in Zenith Radio was not offered as an absolute bar to recovery. Rather, the defense was asserted to limit Zenith's recovery to only those damages resulting from Sherman Act violations occurring within the limitations period.

premise for the court's holding was that the trial court abused its discretion because Petitioner had waived the statute of limitations defense. Appendix A at 7-8a. As such, the court of appeals failed to recognize the district court's discretion to consider the belatedly raised statute of limitations defense. *See*, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 at 331-2.

The Eleventh Circuit's failure in this regard is highlighted by its discussion of Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). As stated by the Eleventh Circuit in the present case:

> In [Heiar], the County pled the statute of limitation in its answer but did not allude to the matter again in the district court. **The County attempted to raise it before the appellate court** which rejected the effort. Of particular importance to the court was the fact that 'had the plaintiffs known that this statute of limitations was in play they might have presented evidence in the district court to show that the defendants had tolled it. . . .' *Id.* at 1197. Similarly, in this case, if Liberty had brought the limitations issue to the attention of the court during the second trial, Day could have offered evidence that the statute was tolled during some period of time or have insisted that the instructions reflect the effect of the statute of limitations on any possible recovery by him. Since day did not refer to the limitations question until after the jury returned its verdict, those options were not available to Day.

Appendix A at 7a (emphasis added). The distinction between Heiar and the case at bar is crucial. Raising a defense for the first time before a court of appeals would rob the trial court of its discretion to control the course of proceedings and the orderly presentation of evidence. As the Seventh Circuit appropriately held in Heiar, allowing a statute of limitations defense that was not raised with the trial court to be considered by the court of appeals would not allow the plaintiff an opportunity to present evidence of tolling.

In the present case, by contrast, the statute of limitations defense was raised with the trial court, and, as the Supreme Court noted in Zenith Radio, *supra*, the trial court had the discretion to reopen the evidence and allow Respondent to perfect its proof with regard to any tolling issue. The fact that the trial court in this case did not reopen the case on the tolling issue is not surprising and does not support an abuse of discretion argument. There is no indication in the record that Respondent ever sought to present any evidence that the two-year non-willful statute of limitations should be tolled, and, presumably, the trial court heard sufficient evidence throughout the course of proceedings to conclude that there was no tolling issue in this case.[4] Importantly, the district court specifically

---

4. Interestingly, while it is unimportant to the central issue presented by this case, the circuits are united in holding that the only reason that the Respondent in this case had the benefit of the two-year/three-year terraced statute of limitations in the first place derives from equitable tolling principles. Prior to the Civil Rights Act of 1991, the ADEA incorporated the statute of limitations provision contained in the Portal-to-Portal Pay Act of 1947, 29 U.S.C. § 255. Section 255(a) is the source of the two-year statute of limitations period for non-willful ADEA discrimination as well as the three-year statute of limitations for willful violations of the ADEA. The Civil Rights Act of 1991 amended the ADEA to provide that suit must be brought within 90 days of receiving a determination letter from the EEOC. 29 U.S.C. § 626(e). While

found that Respondent was not prejudiced by the belated raising of the statute of limitations issue. Appendix B at 12-13a. The district court was especially mindful of the fact that Respondent's complaint interjected the statute of limitations into this case by explicitly pleading that the complaint was filed within the three-year statute of limitations applying to willful violations of the ADEA. *Id.*

II. There is a Split Between the Circuits Regarding the Articulated Rule for the Deference Afforded a Trial Court to Consider a Belatedly Raised Affirmative Defense.

The need for this Court's guidance with respect to belatedly raised affirmative defenses is manifest considering the divergence found in the case law where the circuit courts

---

Respondent was terminated and filed his charge of discrimination just prior to the effective date of the Civil Rights Act of 1991 (November 21, 1991) the complaint was not filed until April, 1994. Each circuit that has addressed the issue has concluded that the amended, 90-day statute of limitations period applies to all suits filed after the effective date of the 1991 act, irrespective of when the last discriminatory act occured. Browning v. AT&T Paradyne, 120 F.3d 222 (11th Cir. 1997); Zotos v. Lindbergh School District, 121 F.3d 356 (8th Cir. 1997); St. Louis v. Texas Worker's Compensation Commision, 65 F.3d 43 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 2563, 135 L. Ed. 2d 1080 (1996); Garfield v. J.C. Nichols Real Estate, 57 F.3d 662 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 380, 133 L. Ed. 2d 303 (1995); Vernon v. Cassadaga Valley Central School District, 49 F.3d 886 (2nd Cir. 1995). However, where, as here, the plaintiff is informed by the EEOC or an appropriate state agency that the longer statute of limitations period applies to his or her claim, then the statute of limitations may be equitably tolled. Browning v. AT&T Paradyne, *supra*. In any event, for purposes of this case, Petitioner does not contest that the Respondent should be given the benefit of the statute of limitations stated in the Portal-to-Portal Pay Act, 29 U.S.C. § 255.

have addressed this issue. In this case, for instance, the Eleventh Circuit articulates a *per se* rule that an unpled affirmative defense is waived. Similarly, in Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979), the Fifth Circuit stated:

> Appellant did not raise the [statute of limitations] defense in its pleadings or in objection to the court's jury instructions. Indeed, appellant did not bring the issue to the court's attention until it presented a motion for judgment notwithstanding the verdict. Consequently, appellant has waived any objection to the limitations period.

590 F.2d at 134. The circuit court in the present case also adopted a *per se* rule in this case, holding that "regardless of the allegations of a complaint, the federal rules specifically require that the affirmative defense of the statute of limitations be separately plead." Appendix A at 6a.

The D.C. Circuit has also recently articulated a clear *per se* rule that an affirmative defense is forfeited when it is not pled. Harris v. Secretary, U.S. Department of Veterans Affairs, 126 U.S. 339 (D.C. Cir. 1997). In Harris, the trial court had granted summary judgment on a meritorious statute of limitations defense which was not pled in the defendant's answer but which was asserted in defendant's motion for summary judgment. The D.C. Circuit reversed, holding that the unpled affirmative defense was necessarily forfeited by the defendant. *Id.* ("Rule 8(c) means what it says: affirmative defenses must be raised in a responsive pleading, not a dispositive motion.").

In contrast to this *per se* waiver approach, other courts

candidly recognize the trial courts' broad discretion to consider belatedly raised affirmative defenses. *See, e.g.*, Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1374 (3rd Cir. 1993) ("Although the College did not assert the defense of immunity under the Act in its answer, it did raise this defense in paragraph nine of its motion for summary judgment. Even though a motion for summary judgment is not the most appropriate way to raise a previously unpled defense of immunity, we think it would be inappropriate in the present case to decide the immunity issue on the basis of waiver."); Phelps v. McClellan, 30 F.3d 658, 662-3 (6th Cir. 1994) (noting that there are "numerous exceptions" to the rule that failure to plead an affirmative defense results in its waiver); Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993) ("It is well established, however, that failure to raise an affirmative defense by responsive pleading does not always result in waiver."); Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993) ("In the absence of a showing of prejudice, an affirmative defense may be raised for the first time at summary judgment."); Blaney v. United States, 34 F.3d 509 (7th Cir. 1994) (holding that where a district court "chose to recognize the timeliness issue as a defense, the defendants cannot be deemed to have waived the issue."). Perhaps most interesting and instructive is the 7th Circuit's opinion in Emich Motors Corp. v. General Motors Corp., 229 F.2d 714 (7th Cir. 1956). In Emich, as in the present case, the defendant raised a valid statute of limitations defense at the conclusion of trial. 229 F.2d at 715. Like the present case, the trial court considered the meritorious, albeit belatedly raised statute of limitations defense and granted judgment in favor of the defendant as a matter of law. *Id.* Unlike the present case, however, the Seventh Circuit affirmed the trial court's grant of summary judgment, acknowledging the trial court's broad discretion in this regard. *Id.* The Emich court keyed in on this Court's

language in a pre-rules case:

> 'It is well settled that ... a defendant who desires to avail himself of a statute of limitation as a defense must raise the question *either in the pleading, or on the trial, or before judgment.*'

229 F.2d at 717, *quoting*, Retzer v. Wood, 109 U.S. 185, 187, (1884) (emphasis in Emich).

As this Court noted in Conley v. Gibson, 355 U.S. 41 (1957);

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

355 US. at 48. This Court pointed out in Zenith Radio, *supra*, that there are situations where the trial court will have discretion to reject a meritorious defense when that defense is raised after trial and the delay prejudices the opposing party, but, by the same token, this Court observed that the trial court has discretion to consider a belatedly raised defense on its merits and to allow the parties to perfect their proof with regard to that defense. 401 U.S. at 330-2.

In the present case, the district court, exercised its sound discretion to reach the merits of a valid defense. Moreover, as noted by Judge Vinson, the statute of limitations defense in this case was one which Respondent explicitly addressed in his complaint. The Eleventh Circuit applied a *per se* waiver rule which usurped the district court's discretion to control the

manner of pleadings and the course of litigation below. That rule conflicts with the rule applied in other circuit courts of appeals' which allows the trial court the discretion to consider a belatedly raised, unpled affirmative defense.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals, and this Court should reject the *per se* rule and grant the trial courts of this land the discretion to consider unpled affirmative defenses when raised by subsequent means, including post-trial motions.

Respectfully submitted,

PEYTON LACY, JR.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1900 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 328-1900

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 22, 1997

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Samuel L. Day,

Plaintiff-Appellant,

versus

Liberty National Life Insurance Company,

Defendant-Appellee.

No. 96-2927

Appeal from the United States District Court for the Northern District of Florida. (No. 94-50124/RV). Roger Vinson, Judge.

Before, CARNES, Circuit Judge, and HENDERSON and FLOYD R. GIBSON,* Senior Circuit Judges.

PER CURIAM

Samuel L. Day filed this action pursuant to the Age Discrimination in Employment Act ("ADEA")[1] charging that

---

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1] 29 U.S.C. § 621 et seq.

the defendant, Liberty National Life Insurance Company ("Liberty"), discriminated against him because of his age when it terminated his employment. Following a mistrial, the jury in the second trial concluded that age was a determining factor in Liberty's decision to discharge Day and awarded him $300,000.00 in back pay and compensatory damages. The jury also found, however that there was no willful violation of the ADEA by the company. Liberty then filed a motion to alter or amend the judgment, contending for the first time that Day's recovery of compensatory damages alone was barred by the statute of limitations. The district court granted the motion and entered a judgment for Liberty. Day filed this timely appeal from that judgment. For the reasons that follow, we reverse the order of the district court and direct that the jury's award be reinstated.

I. FACTS

Day was born in January, 1939 and began working for Liberty in March of 1970 as a sales agent. He received many honors over the term of his employment for his sales production. In the years just before his termination in May, 1991, however, Day claims to have been negatively impacted by company policies and attitudes against older employees. Jack Brown, President of Liberty, took responsibility for Day's dismissal, giving as the reason his high claims loss ratio. Day was never warned of the company's dissatisfaction with that or any other problem nor was he given any training to correct any perceived deficiencies in his performance prior to his termination.

Day filed this action *pro se* on April 29, 1994. The

complaint alleged in part: "Plaintiff received a determination three days before his two year statute expired stating that he had three years to file a lawsuit. Plaintiff brings this lawsuit within three years of the discriminatory discharge to challenge intentional and willful violations" of the ADEA.[2] In its answer, Liberty asserted several affirmative defenses but did not plead the statute of limitations as an affirmative defense.[3] At the time of the events giving rise to this litigation, the ADEA incorporated the two-tiered statute of limitations contained in the Portal-to-Portal Pay Act of 1947. *See* 29 U.S.C. § 626(e)(1). That statute provided that an action would be "forever barred unless commenced within two years after the cause of action accrued. . . ." 29 U.S.C. § 255(a). Day filed this suit more than two years but less than three years after his cause of action arose.

Prior to the first trial, the parties filed a joint pretrial stipulation of all the legal and factual issues to be decided by the court and jury. Liberty did not raise any issue which could be construed as a limitations defense. The first proceeding ended in a mistrial after the jury failed to reach a verdict. In the two months intervening between the first and second trial of the case, Liberty did not move to amend the pretrial stipulation or file any other pleading invoking a statute of limitations defense. At the conclusion of the second trial, the jury returned a special verdict finding that "age was a determining factor" in the termination of Day's employment and awarded Day

---

[2] R.1-1, Complaint at ¶ 2.

[3] R.1-3, Answer and Affirmative Defenses at ¶¶ 16-17.

$300,000.00 in back pay and compensatory damages. In response to a third interrogatory, the jury found that Liberty's violation of the ADEA was not willful. A notation under that question on the verdict form informed the jury that "[i]f you answer 'Yes,' the Court will double the amount of damages you found in Question No. 2."

After the jury returned its verdict, Liberty for the first time suggested to the district court that the jury's finding that the violation was not willful barred any recovery by Day under the two-year statute of limitations for non-willful violations of the ADEA. The transcript reveals that both the district court and plaintiff's counsel were surprised by this assertion, and that the court told the parties to brief the issue. The district court then entered a final judgment in Day's favor for $300,000.00 in accordance with the jury's verdict.

Liberty subsequently filed a Fed.R.Civ.P. 59 motion to alter or amend the judgment, arguing that any recovery was barred by the statute of limitations. Day also filed a Rule 59 motion, urging that the jury's finding of non-willfulness was against the great weight of the evidence and that he was entitled to have the compensatory damages awarded by the jury doubled by the court.[4]

---

[4] In his motion to alter or amend, Day also contended that the jury instructions and verdict form were in error since the notation following the third question informed the jury that a "yes" answer would lead to a doubling of the amount awarded in response to the second question but did not advise the jury that a "no" answer would lead to no recovery by Day. The district court rejected this contention on the ground that "the plaintiff did not object to the instructions or verdict form at trial. . . ." (Order dated June 12, 1996 at 4).

II. STANDARD OF REVIEW

We review the district court's grant of a Rule 59 motion for an abuse of discretion. *See, e.g., Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993).

III. DISCUSSION

A. Statute of Limitations.

On appeal, Day alleges that the district court abused its discretion in granting Liberty's motion to alter or amend based on the two-year limitations period. He argues that Liberty waived the statute of limitations defense because it was not asserted in its answer to the complaint or at any other point in the first or second trial before the jury returned its verdict in his favor. He notes that Liberty did not refer to any limitations problem in its pretrial stipulations or make any motions during trial based on his failure to file within the limitations period.

Liberty concedes that it did not raise the limitations

On appeal, Day claims that he did preserve his objection to the jury instructions. The transcript of the jury charge conference discloses that Day did object to the jury verdict form, specifically to the notation following the third question that damages would be doubled if the jury found that Liberty acted willfully. The district court overruled Day's objection to the text of the verdict form. While Day is thus correct about this point, he does not tie it to any specific requested relief. Given that we are reinstating the jury's verdict, it is not necessary to further address this question.

defense but points out that Day's complaint specifically stated that it was brought within three years seeking redress for intentional and willful violations of the ADEA. Therefore, according to Liberty, proving that it acted willfully was an element of Day's cause of action. That issue was submitted to the jury, and the jury decided it adversely to Day.

The statute of limitations is an affirmative defense which must be specifically pled. Fed.R.Civ.P. 8(c). This court has held in a number of discrimination actions that failure to plead the bar of the statute of limitations constitutes a waiver of the defense. *See, e.g., E.E.O.C. v. White & Son Enterprises*, 881 F.2d 1006, 1009 (11th Cir. 1989)(statute of limitations must be expressly pleaded and included in pretrial order or it is waived). Thus, in *Paetz v. U.S.*, 795 F.2d 1533, 1536 (11th Cir. 1986), a panel of this court ruled that the government's failure to interpose the statute of limitations constituted waiver of the defense. According to the court, "[w]e need not determine the date on which the applicable statute of limitations began to run. A statute of limitations defense is an affirmative defense.... The government did not plead a statute of limitations defense in 1975; the defense is waived." *Id.* (citations omitted).

Liberty denies that its failure to raise the statute of limitations in a timely fashion prejudiced Day because the complaint itself interjected the issue into the case. This assertion is without merit. First, Day's complaint was drafted and filed *pro se* by someone who clearly had no legal training. Furthermore, regardless of the allegations of a complaint, the federal rules specifically require that the affirmative defense of the statute of limitations be separately pled. At no point from

the filing of the complaint until the return of the jury's verdict in the second trial did Liberty even suggest that it was relying on a limitations defense or that Day's recovery would be barred unless he established a willful violation of the ADEA. In its trial brief and other filings, Liberty suggested that willfulness was relevant only to determining whether Day was entitled to liquidated damages.

The Seventh Circuit Court of Appeals considered a similar problem involving the ADEA's two-tiered limitations period in *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985). In that case, the County pled the statute of limitations in its answer but did not allude to the matter again in the district court. The County attempted to raise it before the appellate court which rejected the effort. Of particular importance to the court was the fact that "had the plaintiffs known that this statute of limitations was in play they might have presented evidence in the district court to show that the defendants had tolled it. . . ." *Id.* at 1197. Similarly, in this case, if Liberty had brought the limitations issue to the attention of the court during the second trial, Day could have offered evidence that the statute was tolled during some period of time or have insisted that the jury instructions reflect the effect of the statute of limitations on any possible recovery by him. Since Liberty did not refer to the limitations question until after the jury returned its verdict, those options were not available to Day.

While there does not appear to be any case where this court has reviewed a district court order permitting a defendant to assert a statute of limitations defense after a jury verdict, this

court's predecessor affirmed a district court's rejection of such an effort. In an early age discrimination case, the defendant raised the statute of limitations for the first time in a motion for judgment notwithstanding the verdict. *Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979). The former Fifth Circuit Court of Appeals noted that "[a]ppellant did not raise the defense in its pleadings or in objection to the court's jury instructions. . . . Consequently, appellant has waived any objection to the limitations period." *Id.* at 134. The circumstances in this case are virtually the same. Accordingly, the district court erred in granting Liberty's Rule 59 motion.[5]

B. Liquidated Damages.

Day also appeals the district court's denial of his motion to alter or amend the judgment to award liquidated damages based on the jury's finding that his dismissal by Liberty was not willful.

Under the ADEA, an employee is entitled to liquidated damages only for a willful violation of the statute. Willfulness

---

[5] We note also that it is the law of this circuit that a defendant can waive a potentially viable defense by failing to ensure that the issue is clearly preserved in the pretrial order. *See Hodges v. United States*, 597 F.2d 1014, 1017 (5th Cir. 1979). This court recently held that a municipal defendant in a civil rights case could not avail itself of the defense provided by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a city may not be liable unless the individually named defendant is the final policymaker with respect to that issue, when the city did not preserve the issue for trial in the district court. *Morro v. City of Birmingham*, 117 F.3d 508 (11th Cir. 1997). This was true even though the court had "little doubt that the City would be entitled to escape the judgment against it on that basis." *Id.* t 515.

exists when the employer knew its conduct was prohibited or showed reckless disregard for whether its conduct was prohibited by the ADEA. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). Generally, willfulness is a question of fact for the jury, and the jury's finding on that issue is not to be readily disturbed. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988).

Day maintains that the evidence shows that Liberty pursued discriminatory policies based on age. The evidence in the record before us leaves room for reasonable minds to differ and does not appear to establish that point conclusively. The jury heard that evidence and reached the contrary determination. The district court did not err in refusing to overturn that finding and award Day liquidated damages.

Accordingly, that portion of the district court's order granting Liberty's motion to alter or amend is REVERSED and the portion of the order denying Day's motion is AFFIRMED. We reinstate the jury verdict of an ADEA violation and its award of back pay and compensatory damages in favor of Day. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d at 1563.

REVERSED in part and AFFIRMED in part.

APPENDIX B
MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA ENTERED JUNE 12, 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SAMUEL L. DAY,

Plaintiff,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

Case No. 94-50124-RV

ORDER

Pending is the motion of defendant Liberty National Life Insurance Company to alter or amend the judgment, or in the alternative, for a new trial. (doc. 84) Also pending is the defendant's motion for judgment on the verdict (doc. 80), the plaintiff's motion for attorney's fees and costs (doc. 82), and the plaintiff's motion to alter or amend the judgment. (doc. 83)

I. BACKGROUND

Plaintiff Samuel L. Day filed this action on April 29, 1994, alleging that the defendant, Liberty National Life

Insurance Company, discriminated against him on the basis of age when it terminated his employment. The first trial resulted in a hung jury, and the case was retired on March 25-27, 1996. The special verdict form asked the jury to decide whether the defendant intentionally discriminated against the plaintiff, and if so, whether such discrimination was willful. The jury found that the defendant did in fact discriminate against the plaintiff, but that such discrimination was not willful. (doc. 74) The jury awarded damages in the amount of $300,000.

After the acceptance of the verdict, the defendant raised the issue of the applicability of the statute of limitations, in light of the absence of a finding of willfulness. The parties were directed to file memoranda of law on the issue of whether the plaintiff should be precluded from any recovery against the defendant based on the statute of limitations. Now under consideration are the motions resulting from the defendant's assertion of the statute of limitations.

II. DISCUSSION

A. Statute of Limitations

The defendant contends that since the jury determined that the defendants did not willfully violate the ADEA, the plaintiff is barred from recovery by the applicable statute of limitations. The plaintiff contends that the defendant waived its right to assert the statute of limitations by failing to raise the affirmative defense in its answer, and by failing to assert the defense in the pretrial stipulation, in the trial brief, or during the trial.

Appendix B

The provisions of Title 29, United States Code, Section 255 are applicable to actions brought under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. 626(e). Under Section 255, an action must be commenced within two years after the accrual of the cause of action, unless the violation of the ADEA was willful, in which case the period is extended to three years. 29 U.S.C. § 255(a).

The complaint in this case was filed on April 26, 1994. Day's cause of action under the ADEA had accrued at least by October 8, 1991, the date on which he filed a charge of discrimination with the EEOC. Accordingly, the complaint was filed after two years, but within three years, of the accrual of the cause of action. Since the three year period of Section 255 only applies where the discrimination is willful, the jury's finding of no willfulness made the plaintiff's action untimely under the two year period.

As noted by the plaintiff, the defendant did not raise the statute of limitations as an affirmative defense in its answer, and did not address the limitations issue in the pretrial stipulation, in its trial brief, or at trial. Instead, the plaintiff raised the issue in his complaint, stating that his action was brought within the three year statutory period. The plaintiff argues that the defendant, by its inaction, has waived the staute of limitations defense.

Federal Rule of Civil Procedure 8(c) requires that the affirmative defense of a statute of limitations be set out in the responsive pleading. In most cases, the failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. E.E.O.C. v. White & Son Enterprises,

881 F.2d 1006 (11th Cir. 1989); American National Bank v. FDIC, 710 F.2d 1528 (11th Cir. 1983). See Wright & Miller, Federal Practice & Procedure § 1278, at p. 477. However, "[t]he purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it." Hassan v. United States Postal Service, 842 F.2d 260, 263 (11th Cir. 1988). When the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue. Id.; Jones v. Miles, 656 F.2d 103, 107 n.7 (5th Cir. Unit B 1981).

The difficulty here is that Section 255 does not function like the typical statute of limitations. Unlike the typical statute of limitations, which establishes a clear dividing line for filing claims, the applicable period under Section 255 depends on resolution of the issue of willfulness, a factual question to be submitted to the jury. Fowler v. Land Management Grolupe, Inc., 978 F.2d 158, 163 (4th Cir. 1992). In this case, the parties were aware at all stages of the case that the question of willfulness was one that would have to be resolved by the jury. Since the plaintiff had notice of the potential limitations problem under Section 255, and of the necessary factual determination to be made on the willfulness issue, the defendant did not waive the limitations issue.[1]

---

[1] The plaintiff relies upon Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984), where the defendant was held to have forfeited its statute of limitations defense. Id. at 1196. Heiar is not applicable here, however, since it dealt with a situation where the defendant first raised the defense on appeal.

Appendix B

B. Jury Instructions and Verdict Form

The plaintiff contends that the jury instructions were in error, as the jury should have been informed that the plaintiff would recover nothing in the absence of a finding of willfulness. The plaintiff also contends that since the defendant failed to object to the instructions and the special verdict form, which both contemplated that a finding of intentional discrimination would result in an award of damages, the defendant waived its right to rely upon the statute of limitations.

Because of the nature of the statute of limitations provided in Section 255, the jury was required to determine: (1) whether the defendant discriminated against the plaintiff on the basis of his age; and (2) whether the discrimination was willful. The defendant was not required to object to the instructions or verdict form, since the determinations made by the jury were essential to resolving the limitations issue. As to the plaintiff's argument that the jury should have been informed that the plaintiff would recover nothing in the absence of a finding of willfulness, the plaintiff did not object to the instructions or verdict form at trial, although he was aware that the statute of limitations posed a potential problem. Further, such an instruction would have been prejudicial to the defendant. Even more importantly, neither side advised me that there was a pending statute of limitations issue which would be resolved by the jury's verdict on the willfulness. Therefore, I had no way to anticipate and avoid the potential problem or to have prepared different instructions or a different verdict form.

C. Willfulness

Finally, the plaintiff contends that the finding of the jury that the intentional discrimination of the defendant was not willful is against the great weight of the evidence, and that liquidated damages should be awarded.

A motion to amend or set aside judgment may only be granted if the movant shows there was a mistake of law or fact, or presents newly discovered evidence that could not have been discovered previously. Deutsch v. Burlington Northern R. Co., 983 F.2d 741 (7th Cir. 1993). Such a motion may not be granted "where to do so would undermine the jury's fact-finding role and trample on the defendant's seventh amendment right to a jury." Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 473 (2d Cir. 1985); Robinson v. Watts Detective Agency, 685 F.2d 729, 742 (1st Cir. 1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 728, 74 L.Ed.2d 953 (1983).

Under the ADEA, an employee is entitled to double damages when the employer's discriminatory conduct is willful. 29 U.S.C. § 626(b). The double recovery is punitive and is intended to deter willful conduct. Trans World airlines, Inc. v. Thurston, 469 U.S. 111, 125-26, 105 S.Ct. 613, 623-24, 83 L.Ed.2d 523 (1985). The Supreme Court has defined a willful violation of the ADEA as one in which the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Hazen Paper Co. v. Biggins, ___ U.S. ___, 113 S.Ct. 1701, 1708, 123 L.Ed.2d 338 (1993) (citation omitted). "Thus, an employer who has engaged in conduct that violates the ADEA, but did not know (and was not reckless in its ignorance) that the conduct would

violate the ADEA, will be liable only for a nonwillful violation and will not be subject to liquidated damages." Peterson v. Ins.

Co. of North America, 40 F.3d 26, 31 (2nd Cir. 1994). See Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 722 (1st Cir. 1994).

The plaintiff argues that since the jury found that age was a determinative factor in the defendant's decision to terminate the plaintiff, the only possible conclusion is that the defendant's conduct was willful. However, in assessing willfulness, the jury does not consider whether the employer's conduct is intentional or deliberate, since such a finding must be made in any event. Peterson v. Ins. Co. of North America, 40 F.3d 26, 31 (2nd Cir. 1994). Although, as the plaintiff notes, the defendant stated in the pretrial stipulation that it had been aware of the ADEA and its requirements, a finding of willfulness "requires something more than merely showing that an employer knew about the ADEA and its potential applicability in the workplace." Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 721 (1st Cir. 1994). See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 127, 105 S.Ct. 613, 625, 83 L.Ed.2d 523 (1985). Here, the issues of intent and willfulness were hotly contested at trial. The plaintiff and the defendant presented conflicting evidence on both issues, and the jury, in its role as finder of fact, found that the defendant did not willfully violate the ADEA. Since the plaintiff has not shown that there was a mistake of law or fact resulting in the jury's determination, the plaintiff's motion to alter or amend the judgment is DENIED.

Appendix B

III. CONCLUSION

For the reasons discussed above, the defendant's motion to alter or amend the judgment is GRANTED. (doc. 84) The plaintiff's motion for attorney's fees and costs is DENIED. (doc. 82) The plaintiff's motion to alter or amend the judgment is DENIED. (doc. 83) The defendant's motion for judgment on the verdict is DENIED as moot. (doc. 80) The Clerk is directed to enter judgment for the defendant, together with taxable costs.

DONE AND ORDERED this 12th day of June, 1996.

/s/ Roger Vinson
ROGER VINSON
United States District Judge

APPENDIX C
ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RESPECTING PETITIONER'S PETITION FOR REHEARING, FILED DECEMBER 10, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2927

SAMUEL L. DAY,

Plaintiff-Appellant,

versus

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d___).

Before: CARNES, Circuit Judge, HENDERSON and GIBSON*, Senior Circuit Judges.

Appendix C

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Proceduire; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Edward E. Carnes
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd T. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2927

SAMUEL L. DAY,

Plaintiff-Appellant,

versus

LIBERTY NATIONAL LIFE
INSURANCE COMPANY,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Florida

Before: CARNES, Circuit Judge, HENDERSON and GIBSON*, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellee, Liberty National Life Insurance Company, Inc., is DENIED.

ENTERED FOR THE COURT:

/s/ Edward E. Carnes
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd T. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX D
PLAINTIFF'S COMPLAINT
FILED APRIL 29, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

SAMUEL L. DAY	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	CV-
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY	)	
	)	
Defendants.	)	

COMPLAINT

I. JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331, 1343(4), the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.

2. Plaintiff has fulfilled all conditions precedent to the institution of this action under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. Plaintiff timely filed his charge of age discrimination within 180 days of occurrence of the last discriminatory act. Plaintiff filed his charges with the state agency. Plaintiff received a determination three days before his two year statute expired stating that he had three years to file a lawsuit. Plaintiff brings this lawsuit within three

years of the discriminatory discharge to challenge intentional and willful violations of the Age Discrimination and Employment Act.

II. PARTIES

3. Plaintiff, Samuel L. Day, is a citizen of the United States of America and a resident of Panama City. His date of birth is 01/22/39.

4. Defendant, Liberty National Life Insurance Co., is subject to suit under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. The defendants employ at least twenty (20) persons.

III. CAUSES OF ACTION

5. The plaintiff re-alleges and incorporates by reference paragraphs 1-4 above with the same force and effect as if fully set out in specific detail hereinabove.

6. The defendants discriminate on the basis of age against the plaintiff with respect to employment opportunities, including but not limited to, discharge, hiring, layoff, recall, transfer and termination.

7. The plaintiff was subjected to unequal treatment on account of his age regarding the defendant's decision to terminate Mr. Day.

8. Mr. Day was employed by the defendant continuously from 1970 until 1991.

9. Mr. Day had an excellent sales record with the defendant. He has won numerous sales awards.

10. In January 1991, Liberty National instituted a new method of evaluation of employees. The new performance measurement compared premiums earned by the agent to the claims that would have to be paid by the company.

11. Unfortunately for Mr. Day a number of his clients became sick and had untimely deaths. The company had to pay out claims on Mr. Days (sic) clients, and as a result terminate him. Mr. Day believes that his termination is a pretext for age discrimination. Mr. Day was 2 ½ years away from retirement with a substantial pension.

12. Mr. Day had developed a substantial route business that involved the collection of premiums. Upon his termination the company could turn over the business to a younger employee who would not earn the same commission.

13. Three weeks prior to his termination Mr. Day was selected to go to the "Torch Convention" a sales meeting of the company's most successful insurance representatives.

14. Upon information and belief the company used the new evaluation system solely for the purpose of eliminating Mr. Day. The new evaluation system was not applied to younger employees in a manner that resulted in termination.

COUNT I

15. The defendant has intentionally discriminated

against the plaintiff on account of his age in violation of 29 U.S.C. § 621 et. seq. (sic). The plaintiff seeks back pay, injunctive relief, punitive damages, and liquidated damages.

IV. PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully prays that this Court assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of the defendant is violative of the rights of the plaintiff as secured under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq; and

2. Grant plaintiff a permanent injunction enjoining the defendant, its agents, successors, employees from continuing to retaliate against the plaintiff and to violate 29 U.S.C. §621 et seq, the Age Discrimination in Employment Act; and

3. Enter an Order requiring the defendants to make the plaintiff whole by reinstating him to a comparable position he would have occupied in the absence of age discrimination, including backpay (plus interest), compensatory and punitive damages, liquidated damages, lost seniority, benefits, and loss of pension;

4. The plaintiff further prays for such other relief and benefits as the cause of justice may require, including, but not limited to, an award of costs, attorneys' fees and expenses.

Respectfully submitted,

Appendix D

Samuel L. Day
1120 Tennessee Ave
Lynn Haven Florida 32444

PLAINTIFF DEMANDS A TRIAL BY STRUCK JURY ON THOSE ISSUES TRIABLE BY JURY.

Samuel L. Day

DEFENDANT ADDRESSES:

Liberty National
1900 Liberty Lane
Panama City, Florida 32405

Supreme Court, U.S.
FILED
APR 9 1998
CLERK

(2)

No. 97-1481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LIBERTY NATIONAL LIFE INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

SAMUEL L. DAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

BRADLEY S. ODOM
(Counsel of Record)
KIEVIT, KELLY & ODOM
15 West Main Street
Pensacola, Florida 32501
(850) 434-3527
Counsel for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3286

58 pp

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding because it does not list the Plaintiff/Respondent, Samuel L. Day. With that addition, the petition accurately lists the parties to this proceeding.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Authorities iv

Statement of the Case 1

A. The Question Presented, as listed by petitioner, is inaccurate and misleading 1

B. In its Statement of the Case, the Petitioner has selectively ignored numerous salient facts 2

Reasons for Denying the Writ 11

I. The issue presented in this case is nearly incapable of surfacing again because the relevant statute has been amended 11

II. This Court has already denied certiorari in a nearly identical case ... 12

III. There is no conflict among the circuits on this issue 13

IV. The Eleventh Circuit Court of Appeals made the proper decision in the case *sub judice* 18

Conclusion 21

APPENDIX A 1a

Defendant's Answer and Affirmative Defenses, filed August 19, 1994

APPENDIX B 4a

Joint Pre-Trial Stipulation, filed October 27, 1994

APPENDIX C 19a

Defendant's Trial Brief, filed November 2, 1995

APPENDIX D 24a

Special Verdict

APPENDIX E 26a

Excerpts from Trial Transcript, dated March 27, 1996

Contents

Page

TABLE OF AUTHORITIES

Cases Cited:

Aluminum Prods. Distribs., Inc. v. Aaacon Auto Transp., Inc., 549 F.2d 1381 (10th Cir. 1977) 16

Castle v. Sangamo Weston, Inc., 837 F.2d 550 (11th Cir. 1988) 5

Dunn v. Koehring Co., 546 546 F.2d 1193 (5th Cir. 1977) 15

EEOC v. White & Son Enters., 881 F.2d 1006 (11th Cir. 1989) 19

Harris v. Secretary, U.S. Dept. of Veterans Affairs, 126 F.3d 339 (D.C. Cir. 1997) 18

Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984) cert. denied, 472 U.S. 1027 (1985) 12, 13, 14, 15

Louisville & Nashville R.R. Co. v. M-V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1979) . . . 16

Maleszewski v. United States, 827 F.Supp. 1553 (N.D. Fla. 1993) 4

North Georgia Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429 (11th Cir. 1993) 16, 17

Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979) 15

Scot Lad Foods, Inc. v. Ayar, 113 F.3d 1235, 1997 WL 199493 (6th Cir. April 22, 1997) 15

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1970) 20, 21

Statutes Cited:

29 U.S.C. §255 11

29 U.S.C. §626(e) 12

Rules Cited:

Fed.R.Civ.P. 8(c) 14, 16, 19, 20

Fed.R.Civ.P. 15(a) 21

Fed.R.Civ.P. 16(e) 14, 16, 19, 20

Fed.R.Civ.P. 51 ..... 16, 19, 20

Other Authorities Cited:

5 C. Wright & Miller, Federal Practice and Procedure §1278 (1969) 15

STATEMENT OF THE CASE

A. The Question Presented, as listed by Petitioner, is inaccurate and misleading.

In its Question Presented, Petitioner, Liberty National Life Insurance Company (hereinafter "Liberty National"), asks this Court to assume that it had a valid affirmative defense; however, there is no record evidence to support this. Indeed, one of the problems with Liberty National's having first attempted to raise the statute of limitations affirmative defense after the jury had already returned its verdict in favor of respondent, Samuel L. Day (hereinafter "Day"), was that he had no opportunity to present evidence on the issues of equitable estoppel and equitable tolling of the statute of limitations.

The question presented offered by Liberty National also fails to alert this Court that Liberty National failed to articulate its affirmative defense at any time through the various stages of the case and indeed did not even object to the jury verdict form which stated that Day would receive damages if he proved an intentional but non-willful violation of the Age Discrimination in Employment Act (hereinafter "ADEA").

Because of these shortcomings, Day proposes the following question presented:

whether the circuit court properly recognized that the trial court abused its discretion when it permitted Liberty National to raise a statute of limitations affirmative defense where Liberty National failed to raise that defense in its pleadings, failed to ever amend its pleadings, failed to raise it in a joint pre-trial stipulation which was incorporated into a pre-trial order, failed to raise it in its trial brief, failed to request a jury instruction on the statute of limitations, failed to object to the jury's special verdict form, and raised that affirmative defense for the first time after the jury had returned a verdict in Day's favor, surprising both the court and Day in the process.

B. In its Statement of the Case, the Petitioner has selectively ignored numerous salient facts.

In relating its Statement of the Case, Liberty National has selectively related the facts and in doing so has ignored many probative facts. Rather than reiterating an entire Statement of Facts here, Day adds the following additional facts as being especially probative.

When Day filed his lawsuit in the United States District Court for the Northern District of Florida on April 29, 1994, alleging intentional and willful violations of the ADEA, he did so *pro se*. When answering this

complaint, Liberty National did raise affirmative defenses; however, it chose not to raise a statute of limitations defense. Appendix A at 2a.

As the case neared trial, the parties entered into a joint pre-trial stipulation on October 18, 1995. The district court then incorporated these stipulations into its pre-trial order on October 26, 1995 and asked Liberty National to submit a trial brief. Liberty National filed its trial brief on November 2, 1995. Nowhere in the pre-trial stipulation, the pre-trial order, or Liberty National's trial brief is there any mention of a statute of limitations defense. Indeed, any fair reading of those documents leads to the conclusion that the statute of limitations was not an issue in the case.

Specifically, the agreed upon issues of law which were stated in the pre-trial stipulation, and which were incorporated into the pre-trial order, stated:

> 1. This court has jurisdiction over the parties and the subject matter of this dispute.
>
> 2. Plaintiff has fulfilled all of the conditions precedent to the institution of this action.
>
> 3. If plaintiff prevails, his remedies may include back pay, reinstatement or front pay, the value of perks, benefits, including increased retirement benefits, interest --

> including pre-judgment interest, attorneys' fees and costs.
>
> 4. If plaintiff proves that defendant willfully violated the Age Discrimination in Employment Act, he shall be entitled to liquidated damages. Top rove [sic] a willful violation of the Act, plaintiff must demonstrate that defendant knew or should have known that the Age Discrimination in Employment Act prohibited the actions alleged to have been taken against the plaintiff by the defendant, yet undertook such actions in reckless disregard of plaintiff's rights.

Appendix B at 16a. These issues of law were then incorporated into the district court's pre-trial order.

Similarly, in its trial brief, Liberty National set out the law it deemed applicable to the case. In doing so, Liberty National never mentioned any statutes of limitation. Specifically, its trial brief stated:

> 16. Should Defendant be found to have violated the ADEA in discharging Plaintiff, Plaintiff's recovery must be limited to lost wages and benefits. See, Maleszewski v. United States, 827 F.Supp. 1553, 1556 (N.D. Fla. 1993). Moreover, any award of equitable relief (e.g. front page [sic]) should be determined by the Court rather

than the jury.

> 17. Plaintiff's entitlement to liquidated damages is dependent upon proof that Defendant willfully violated the ADEA in discharging Plaintiff. Such a willful violation may be found only where it is determined that Defendant discharged Plaintiff when it "knew or showed reckless disregard for the matter of whether its conduct was published [sic] by the ADEA". Castle v. Sangamo Weston, Inc., 837 F.2d 550 (11th Cir. 1988).

Appendix C at 22a.

Clearly, Liberty National never alerted Day or the court that it was raising a statute of limitations defense in either its answer, the joint pre-trial stipulation which was incorporated into a pre-trial order, or its trial brief. Moreover, after the first trial ended in a mistrial because of jury deadlock, Liberty National never moved to amend the pleadings or the joint pre-trial stipulation to raise an affirmative defense. Indeed, it did nothing to alert anyone that it was intending to rely upon such a defense.

During the second trial, Liberty National did not argue or pursue any limitations defense at the close of Day's case or at the close of the evidence. Moreover, Liberty National did not put on any evidence that the complaint had been filed in excess of two years from

plaintiff's termination. Furthermore, at the jury charge conference held at the conclusion of all the evidence, Liberty National did not request a jury instruction regarding any affirmative defenses. Additionally, it did not object to the jury instructions and/or the special jury verdict form which were ultimately given by the trial court. The special jury verdict form read as follows:

> 1. Do you find, by a preponderance of the evidence, that age was a determining factor in the defendant's decision to terminate plaintiff?
>
> Answer "Yes" or "No".
>
> YES: _____ NO: _____
>
> (If you have answered "Yes", then answer Question No. 2. If you have answered "No", then do not answer any of the other questions, and have your Foreman sign and date this form.)
>
> 2. What amount of back pay and compensatory damages do you find that the plaintiff is entitled to receive?
>
> Amount: $_____
>
> 3. In terminating the plaintiff, do you find that the defendant "willfully" violated the Age Discrimination in Employment

> Act, as the term "willful" was defined for you in the Court's instructions?
>
> Answer "Yes" or "No".
>
> YES: _____ NO: ____
>
> (If you answer "Yes", the Court will double the amount of damages you found in Question No. 2).

Appendix D at 24a - 25a. Clearly, this special verdict form contemplated that Day would receive compensatory damages if the jury found that Liberty National committed an intentional, but not willful, violation of the ADEA.

Despite the above, Liberty National first mentioned a statute of limitations defense after the jury had returned a verdict in Day's favor in the amount of $300,000. The record reveals that neither the court nor the plaintiff were aware the defendant was asserting this defense prior to that time. Liberty National's unveiling of the statute of limitations defense occurred as follows:

> THE COURT: * * * Subject to that, anything else to come before the Court from either side?
>
> MR. KELLY [Counsel for Plaintiff]: Nothing for the plaintiff, Your Honor.

MR. ASHBURN [Counsel for Defendant]: Yes, Your Honor. It's a legal matter that I don't know if we need to take up in front of you or not, based on the verdict that was rendered, Your Honor, based on the answer to Question 3, and the timing of the bringing of this action.

THE COURT: I'm not sure I understand what you mean.

MR. ASHBURN: Your Honor, as a matter of law, this action was not brought within two years; and, therefore, under the statute, for the defendant (sic) to recover any amount of monies, he had to prove that the discrimination was willful. The jury has rendered a verdict that the discrimination was not willful.

THE COURT: We'll take that up, then. I'm not sure that I understand your ramifications of what you are telling me, but we'll take that up in just a moment. I'll let the jury go home.

* * *

(Whereupon the jury was excused and a recess was taken)

THE COURT: Take seats. We have the parties and lawyers here. Mr. Ashburn, tell me what the problem is.

MR. ASHBURN: Yes, Your Honor. Under the statute that the plaintiff has brought his claim, it provides that, if he had filed his action within a certain two-year time frame, then he would be entitled to recover on the findings as we find them in the first two questions. It also provides, however, that, if the claim was not brought within those two years, but it was brought within a three-year period, which this one made it in within a matter of days -- it was made within the three-year period -- that he can only recover if there's a finding that the discrimination is willful.

The jury specifically found on their third item that this was not a willful discrimination; therefore, under that statute, we don't believe he can recover anything.

THE COURT: All right. Mr. Kelly?

MR. KELLY: I don't think that is accurate; but, at this stage, I'm not prepared to argue to the Court.

> THE COURT: All right. Well, I'm going to let you both submit a memorandum on it, and you can do it simultaneously. I'll give you -- let's do it quickly. I'll give you a week from today. So, that ought to be enough time. It ought to be a pretty simply issue, whatever it is. I haven't even realized, I guess, that there was a distinction between the two-year and three-year statute of limitation.
>
> MR. KELLY: There is in terms of damages, Your Honor, that I'm aware of, but not in terms of filing. But, at any rate, we'll find out.
>
> THE COURT: Well, brief it for me, and then I'll make a decision on the matter; and we'll see what else, if anything, we might do.

Appendix E at 26a - 28a (emphasis added).

This is the context in which Liberty National first raised its statute of limitations affirmative defense; after it had failed to raise that defense in its answer, after it had failed to amend its pleadings, after it had failed to raise the defense in the joint pre-trial stipulation, after it had failed to raise the defense in its trial brief, after it had failed to request a jury instruction on that defense or present evidence on it, after it had failed to object to the special verdict form, and after the jury had returned a

verdict against it. Indeed, in doing so Liberty National surprised both the Court and Day. The Eleventh Circuit Court of Appeal concluded that this was too late.

REASONS FOR DENYING THE WRIT

It is beyond dispute that this Court is able to review but a limited number of cases each year. There is no reason for this Court to expend its precious time and resources on this matter. Because Congress has abolished the two-tiered statute of limitations scheme under the ADEA which gives rise to the issues in this case, because this Court previously denied a writ for certiorari in a nearly identical case, because every circuit court which has addressed the issues Liberty National attempts to raise has rendered a holding identical to the one in the instant case, and because the decision of the Eleventh Circuit Court of Appeals was clearly correct, this Court should not expend its limited time and resources on this cause, and it should deny Liberty National's petition for writ of certiorari.

I. The issue presented in this case is nearly incapable of surfacing again.

As this Court is surely aware, prior to the passage of the Civil Rights Act of 1991 the ADEA incorporated the statute of limitations provision contained in the Portal-to-Portal Pay Act of 1947, which is codified at 29 U.S.C. §255. Under this statutory scheme, an ADEA plaintiff had three years in which to file suit alleging a willful violation of the statute but only had two years in

which to allege intentional age discrimination. It is this two-tiered statute of limitations that has caused confusion in the instant case and gives rise to the issues Liberty National now attempts to raise in this Court.

In 1991, however, Congress eliminated this two-tiered statute of limitations scheme, opting instead to allow a plaintiff to file his suit at any time within ninety days of the EEOC's making a determination in his case or issuing him a notice of right to sue. See 29 U.S.C. §626(e). Because of this revision of the ADEA's statute of limitations, it would be virtually impossible for the question presented in Day's case to arise again. Indeed, Day was probably one of the last plaintiffs to have filed suit alleging age discrimination under this two-tiered statute. At any rate, because this Court has limited time and resources, and must necessarily devote its valuable time to the most important legal issues confronting this nation, such limited time and resources would not be wisely expended on an issue which is unlikely to surface again in the context of age discrimination because of Congress' overhauling the ADEA's statute of limitations structure. Consequently, Liberty National's petition for a writ of certiorari should be denied.

II. This Court has already denied certiorari in a nearly identical case.

In 1984 this Court was presented with the opportunity to review a nearly identical case involving the ADEA's two-tiered statute of limitations structure: Heiar v. Crawford County, Wisconsin, 746 F.2d 1190

(7th Cir. 1984). This Court denied the petitioner's invitation to do so. 472 U.S. 1027. For nearly a dozen years thereafter, this issue did not resurface in any case which counsel for either Liberty National or Day has found. Once it finally resurfaced in the instant case, the Eleventh Circuit Court of Appeals rendered a decision which was in complete harmony with the Seventh Circuit Court of Appeals' decision in Heiar. With both courts having reached the same conclusion, there is no reason to believe that other courts will have difficulty addressing this situation, should it ever recur. Consequently, Liberty National's petition for a writ of certiorari should be denied.

III. There is no conflict among the circuits on this issue.

Every circuit court which has addressed the topic of raising an affirmative defense under the ADEA's two-tiered statute of limitations has held that a defendant cannot wait until after a jury has returned its verdict in order to raise that affirmative defense.

As previously related, in Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985), the court addressed a nearly identical situation to that of the case *sub judice*. Like Liberty National, the defendant in Heiar was defending a case brought under the ADEA while it still embraced the two-tiered statute of limitations. Unlike Liberty National, the defendant in Heiar expressly raised the statute of limitations defense in its answer, as

required by Rule 8(c), Fed.R.Civ.P., but failed to mention it again until the case was concluded. Holding that the statute of limitations defense had been abandoned by the defendant, the court found Rule 16(e), Fed.R.Civ.P., dispositive. Id. at 1196.

Rule 16(e) provides that pretrial orders:

> shall control the subsequent course of action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Considering this language, the Heiar court noted that a pretrial order had been entered in the case and that it made no mention of the two-year statute of limitations. 746 F.2d at 1196. Because this order controlled the subsequent action of the case, the court held that the statute of limitations defense had been abandoned. Id. at 1196-97.

In reaching this conclusion, the court in Heiar implicitly recognized that the defendant's failure to mention the statute of limitations defense in the pretrial order had effectively lulled the plaintiffs to sleep, for if they had known that the statute of limitations was in play they might have presented evidence in the district court to show that the statute should be tolled. See id. at 1197. Thus, the defendant was not permitted to wait until this opportunity had passed the plaintiffs by before attempting to resurrect the defense. See id. This same

rationale was found controlling in the case *sub judice*.

The cases of Day and Heiar are the only two which counsel for Day could find that considered the two-tiered statute of limitations scheme which was formerly employed under the ADEA. Nevertheless, analogous cases from other circuits are also in accord with the circuit courts' decisions in Heiar and Day.

In Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979), for instance, the court considered a similar situation and held that an employer who failed to raise a statute of limitations affirmative defense in its pleadings and which failed to object to the court's jury instructions would not be permitted to raise that affirmative defense in a motion for judgment notwithstanding the verdict -- finding that such conduct resulted in the waiver of the statute of limitations affirmative defense. 590 F.2d at 134 (citing 5 C. Wright & Miller, Federal Practice and Procedure, §1278 (1969), and Dunn v. Koehring Co., 546 F.2d 1193, 1199 (5th Cir. 1977)).

A similar decision was also reached by the Sixth Circuit Court of Appeals in Scot Lad Foods, Inc. v. Ayar, 113 F.3d 1235, 1997 WL 199493 (6th Cir. April 22, 1997). In Ayar, the Sixth Circuit similarly held that affirmative defenses not raised in the pre-trial order could not be raised during trial. That is exactly what happened in the instant case, except here Liberty National attempted to raise its affirmative defense even later -- after the jury had returned its verdict.

The above-referenced cases demonstrate that the circuit courts which have addressed similar situations have held with unanimity that defendants who do not raise an affirmative defense until they are awoken by the sound of a substantial verdict against them will be deemed to have waived their affirmative defenses.[1] All of the circuit courts are in accord on this issue, and indeed any other decision would render Rules 8(c), 16(e), and 51, Fed.R.Civ.P., meaningless. Furthermore, any other decision would encourage defendants to remain silent and never alert anyone that any affirmative defenses were in play.

In an effort to find conflict among the circuits where none exists, Liberty National argues that in Day the Eleventh Circuit articulated a *per se* rule that an unpled affirmative defense is waived. (Petition for Certiorari at 13). This position is intellectually dishonest, for the Eleventh Circuit has never embraced this view.

---

[1]After all, it has been noted that "defendants deemed to have waived [affirmative defenses] generally raise[] the issue for the first time quite late in the proceedings -- after a trial has been lost or on appeal." North Georgia Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 432 (11th Cir. 1993)(citing Aluminum Prods. Distribs., Inc. v. Aaacon Auto Transp., Inc., 549 F.2d 1381, 1384 (10th Cir. 1977), and Louisville & Nashville R.R. Co. v. M-V Bayou Lacombe, 597 F.2d 469, 471 n.1 (5th Cir. 1979)).

Indeed, the Eleventh Circuit has long recognized that an answer can be amended to include an affirmative defense as long as all parties are on notice that the defense will be asserted and there is no clear evidence of waiver. E.g., North Georgia Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 431-32 (11th Cir. 1993). Liberty National's wishful thinking notwithstanding, the Eleventh Circuit did not modify this position in Day.

Instead, what the Eleventh Circuit did in the case *sub judice* was recognize that a district court abuses its discretion when it permits a party to raise an affirmative defense where that party failed to raise that defense in its pleadings (but raised other affirmative defenses), failed to amend its pleadings to include that affirmative defense, failed to raise the defense in a joint pre-trial stipulation which was incorporated into a pre-trial order, failed to raise it in its trial brief, failed to request a jury instruction on the affirmative defense, failed to object to the jury's special verdict form, and raised that affirmative defense for the first time after the jury had returned a verdict in favor of the other party. Additionally, it is important to note that even the district court had no idea that the statute of limitations defense was in play.

Given these facts, the Eleventh Circuit's opinion in Day is a far cry from the *per se* approach that Liberty National now argues -- that failure to plead an affirmative defense in an answer constitutes an absolute waiver. Quite simply, the facts of the case do not support this allegation.

In addition to alleging that the Eleventh Circuit has adopted a *per se* approach to affirmative defenses, Liberty National makes a similar baseless assertion concerning the D.C. Circuit's decision in Harris v. Secretary, U.S. Dept. of Veterans Affairs, 126 F.3d 339 (D.C. Cir. 1997). (Petition for Certiorari at 13). Clearly, a closer reading of Harris shows that a *per se* approach was not adopted in that case. To the contrary, the D.C. Circuit merely explained that an affirmative defense should not be raised in a motion; instead, the pleadings should be amended to include that defense. Thereafter, the defense can be raised and argued. 126 F.3d at 339. Clearly, that is a not a *per se* approach. Moreover, it is odd that Liberty National is attempting to rely on Harris even though it never moved to amend its pleadings to include the affirmative defense it now attempts to resurrect.

IV. The Eleventh Circuit Court of Appeals made the proper decision in the case *sub judice*.

The Federal Rules of Civil Procedure provide a level playing field upon which all litigants must prosecute and defend their claims. In the instant case, Liberty National clearly did not adhere to those rules. As a result, the Eleventh Circuit Court of Appeals properly recognized that Liberty National could not raise an affirmative defense after the jury had already returned its verdict, where Liberty National had not even previously intimated that it was relying upon such a defense previously.

Rule 8(c), Fed.R.Civ.P., requires that a responsive pleading set forth certain enumerated affirmative defenses. One of these defenses is the statute of limitations. Rule 8(c) clearly provides that this affirmative defense must be specifically pled and enumerated. It is undisputed that Liberty National never did this. Furthermore, Liberty National never moved to amend its pleadings to include this affirmative defense -- despite the fact that it had raised other affirmative defenses.

In the instant case, the parties entered into a joint pre-trial stipulation which was later incorporated into the district court's pre-trial order. Rule 16(e) provides that pre-trial orders "shall control the subsequent course of action" in the case unless they are modified. And this modification may occur only to prevent "manifest injustice." Rule 16(e), Fed.R.Civ.P. In the instant case, Liberty National did not raise its statute of limitations affirmative defense; therefore, it waived that defense. See, e.g., EEOC v. White & Son Enters., 881 F.2d 1006, 1009 (11th Cir. 1989)(statute of limitations must be expressly pleaded and included in pre-trial order or it is waived). Indeed, any other conclusion would render pre-trial stipulations and pre-trial orders meaningless.

In relevant part, Rule 51, Fed.R.Civ.P., states that no one "may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict." In the instant case, the instructions and the special verdict form both contemplated that a finding of intentional

discrimination would result in an award of make-whole relief, while a finding of willful discrimination would merely increase the award in the form of liquidated damages. Thus, according to the provisions of Rule 51, Liberty National's failure to object to the jury instructions and the special verdict form renders it unable to later argue that those instructions and/or the form are incorrect.

In the instant case, Liberty National failed to comply with Rules 8(c), 16(e), and 51, and in doing so secreted a defense only to raise it after the jury had returned a verdict, surprising the court and Day in the process. Such conscious and deliberate non-compliance with the Federal Rules of Civil Procedure were not condoned by the Eleventh Circuit Court of Appeals and should not be condoned by this Court.

Moreover, the prior decision of this Court in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1970), is in accord. As this Court is well aware, in that case the defendant attempted to raise affirmative defenses which it had not previously raised and was attempting to do so a year after the evidence was closed. Id. at 323. In that instance, the trial court refused to permit the defendant to do this, and this Court affirmed the trial court. In doing so, it recognized that allowing a party to amend its pleadings and raise new affirmative defenses after the close of the evidence would have substantially prejudiced the other party. Id. at 331. It also noted that permitting the defendant to raise new affirmative defenses would have had the effect of denying

a plaintiff the opportunity to prove its case -- which would definitely not conform with the letter or the spirit of the Federal Rules of Civil Procedure. Id. Indeed, this Court further recognized that if a party were entitled to amend its pleadings after the close of the evidence, then the record would have to reopened to hear other evidence. Id.

Applying those facts to the case *sub judice*, it is obvious that the trial court did not adhere to this Court's teachings in Zenith. In the instant case, the district court judge dismissed Day's jury, entered judgment in Day's favor, and then later permitted Liberty National to raise an affirmative defense even though it never moved to amend its pleadings under Rule 15(a), Fed.R.Civ.P. Moreover, Day was never afforded the opportunity to offer any evidence on this issue or present evidence of equitable tolling or modification, even though this Court suggested this was required under Zenith. Nevertheless, the district court, hearing no evidence, set aside Day's judgment. This was clearly an abuse of discretion, and the Eleventh Circuit Court of Appeals properly recognized this. Because this reversal of the district court was proper, Liberty National's petition for writ of certiorari should be denied.

CONCLUSION

Because Congress has abolished the two-tiered statute of limitations scheme under the ADEA which gives rise to the issues in this case, because this Court previously denied a petition for writ for certiorari in a

nearly identical case, because every circuit court which has addressed the issues Liberty National attempts to raise has rendered a holding identical to the one in the instant case, and because the decision of the Eleventh Circuit Court of Appeals was clearly correct, this Court should not expend its limited time and resources on this cause, and it should deny Liberty National's petition for a writ of certiorari.

Dated: April 9, 1998

Respectfully submitted,

BRADLEY S. ODOM
Kievit, Kelly & Odom
15 West Main Street
Pensacola, FL 32501
(850) 434-3527
Counsel for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

MCA 94-50124/RV

SAMUEL L. DAY,

Plaintiff,

vs.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSES

Defendant, Liberty National Life Insurance Company hereby submits its answers and affirmative defenses to Plaintiff, Samuel L. Day's Complaint.

1. Denied.

2. Denied.

3. Admitted.

4. Admit that Defendant employees at least 20 persons but deny that Defendant is subject to suit under the Age Discrimination Employment Act, 29 U.S.C., §621 et seq. in this action.

5. See paragraphs 1 through 4 above.

6. Denied.

7. Denied.

8. Admitted.

9. Admit that Plaintiff won numerous sales awards during his employment with Defendant, but deny that Plaintiff's sales record was "excellent".

10. Denied.

11. Admit that Defendant was required to pay claims on policies issued through Plaintiff, but deny the remainder of the paragraph.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

AFFIRMATIVE DEFENSES

16. Plaintiff's claims are barred by his failure to comply with the requirements of 29UCS, §626(d).

17. Plaintiff's claims are barred by the doctrines of waiver and/or estoppel and/or laches.

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891

/s/ David C. Ashburn
DAVID C. ASHBURN
Fla. Bar No. 708046

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Samuel L. Day, 1120 Tennessee Avenue, Lynn Haven, Florida 32444 this 10th day of August, 1994.

David C. Ashburn
DAVID C. ASHBURN

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Case No. 94-50124-RV

SAMUEL L. DAY,

Plaintiff,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

JOINT PRETRIAL STIPULATION

Counsel for the parties have met, via telephone, due to conflicting schedules. They submit the following joint pretrial stipulation pursuant to this court's order entered on July 17, 1995.

(A) *Jurisdiction.* The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§1331, 1343(4) and the Age Discrimination in Employment Act, 29 U.S.C. §621, *et. seq.*

(B) *Nature of the action.* The nature of this claim is age discrimination.

(C) *Brief statement of each party's case.*

Plaintiff's case. Plaintiff seeks compensatory and liquidated damages, attorneys' fees, interest, including

prejudgment interest, and costs as a result of the discrimination he experienced in connection with various decisions of defendant which affected the terms and conditions of his employment and, ultimately, resulted in his termination.

Defendant's case. Defendant contends that it terminated plaintiff's employment based upon plaintiff's unsatisfactory job performance. Defendant contends that plaintiff's job performance was unsatisfactory because, among other things, plaintiff violated defendant's policies and procedures and sold insurance policies contrary to defendant's underwriting guidelines. Defendant contends that because of plaintiff's unsatisfactory performance, defendant was required to pay an excessive number and amount of insurance claims.

(D) *Exhibits to be offered at trial.*

Plaintiff intends to offer the following exhibits:

1. Agent's contract–Sammy L. Day, Jr.
2. Sales manager weekly requirements
3. Miscellaneous two-page chart regarding Jones Group
4. Letter from Don Horton undated and 11/27-/90 regarding service work
5. Friday sales planning
6. Letter to all DLH district managers dated May 8, 1991
7. Article, "Canvassing is Key" by S. L. Day, Jr.
8. Letter from Bill Jones dated 9/22/92
9. Memos to Torch Club qualifiers, April 1, 1991, and January 25, 1991

10. Extract from policy manual regarding qualifiers not in attendance
11. 1991 Torch Club brochure
12. Various personnel transaction memos for Sammy Day
13. Honor agent by region listing
14. Memo to the district manager dated 4/9/91
15. Letter to Don Pitts dated 4/25/91
16. Handwritten note of requirements dated 4/-18/91
17. Various documents regarding Panama City All Stars with attachments
18. Handwritten note to Day from Horton with attachment
19. Note to Day from Brown
20. Miscellaneous listings of honors, letters of commendation, etc.
21. Printouts of health claims processed
22. The Beacon, May, 1992; April, 1991; June, 1991; March, 1991
23. EEOC charge of discrimination for Sammy Day
24. EEOC determination for Sammy Day
25. Personal achievement file for Sammy Day
26. Note dated 5/20/91 to Shirley regarding Sammy Day's termination
27. Notice of termination of personnel (Sammy Day)
28. Various earnings statements for Sammy Day

29. Summary of claims experience–life
30. Agency management bulletins for Panama City
31. Agency management report of MC policies
32. Payroll deduction persistency reports
33. District summary of net credits for 0073
34. 1988-1990 summary of claims experience–A & H Report
35. Previous four quarters production report
36. Listing of top 100 agents in the company
37. Letter dated April 4, 1991
38. Chart of base growth
39. Various weekly bulletins for Panama City
40. Sales manager premium increase report for 4/25/91

Defendant intends to offer the following exhibits:

1. Liberty National final report of personnel termination
2. Liberty National notice of termination of personnel signed by Don Pitts
3. Liberty National notice of termination of personnel signed by Don Horton
4. 5/20/91 memorandum re Samuel L. Day, Jr.
5. Samuel Lofton Day, Jr. agent's contract dated 4/1/85
6. Samuel Lofton Day, Jr. agent's contract dated 3/23/70

7. Application for life insurance policy; proposed insured: Walter C. Sherman
8. Sherman insurance policy
9. Letter from S. L. Day dated 6/25/91
10. Liberty National agents' job description
11. Liberty National "Guide to Growth for Agents"
12. Liberty National table of personnel changes for District 73
13. Liberty National list of employees of Panama City District 1989 to present
14. Chart depicting claims/loss ratio for Sammy Day
15. Personnel transaction memorandum dated 3/29/91
16. Personnel transaction memorandum dated 1/-11/91
17. Medical records for Enoch Toole
18. Liberty National policy/claim file for Toole
19. Transcript of final hearing; *Day v. Liberty National Life Insurance Company*, Case No. 92-3779; October 13, 1992
20. Transcript of deposition of Sammy Day, October 6, 1992
21. State of Florida, Commission on Human Relations Final Order Dismissing Petition for Relief from an Unlawful Employment Practice, Case No. 91-8507
22. State of Florida, Division of Administrative Hearings, Recommended Order, Case No. 92-3779

23. US Equal Employment Opportunity Commission Determination

24. Administrative complaint filed by Florida Department of Insurance file re D.O.I. Case No. 94-L-345DTG

25. Transcript of final hearing in Florida Department of Insurance Case No. 94-L-345DTG (Division of Administrative Hearings Case No. 94-4317) (not yet prepared by court reporter; will be provided when available)

26. Affidavit of John Brooks re proposed insured David Daugherty

27. Application for life insurance re proposed insured David Daugherty; premium refund request; Liberty National memorandum re same

28. Letter from James Poole, Esq. to Samuel L. Day dated 6/13/91

29. Letter from Walter R. Shellnutt to Samuel L. Day dated 9/27/91 re final settlement of account

30. Notice of Charge of Discrimination from Equal Employment Opportunity Commission

31. Letters from Carol Atkinson to Doug Harris dated October 7, 1991

32. Florida Department of Insurance notification of complaint received from Sibyl Gordey

33. Letter from Ann Jandl to Robert H. Neile dated 4/15/93 re Sibyl Gordey

34. Florida Department of Insurance consumer assistance request by Sibyl Gordey

35. Letter from Inez McCall re Pol. No. 31250757

36. Computer report re Liberty National 1988-90 summary of claims experience—A & H
37. Computer report re Liberty National 1988-90 summary of claims experience—life
38. Documents produced by Day in discovery (will produce at plaintiff's request)
39. "Memorandum Brief in Support of Petitioner's Exceptions to Recommended Order" prepared and filed by Day in Division of Administrative Hearings Case No. 92-3779
40. "Proposed Recommended Order" prepared and filed by Day in Division of Administrative Hearings Case No. 92-3779
41. Charge of Discrimination filed by Day dated 10-/8/91
42. Petition for Relief filed by Day with Florida Commission on Human Relations
43. Florida Commission on Human Relations "Determination: No Cause"
44. Responses to discovery requests filed by Day in this case (will produce at plaintiff's request)
45. Documents proposed as exhibits by plaintiff
46. Agents employed in District 73 since 2/14/95
47. Documents depicting claims/loss ratios for Day
48. Agent's Instruction Guide, 1988-90
49. Field Procedures Manual

Note: The parties reserve the right to add additional exhibits to this list, including documents subsequently discovered, documents obtained pursuant to requests for production, pleadings, answers to interrogatories, and any exhibits which may be listed by the other party.

Objections: Because of the conflicting schedules of the parties' attorneys, they are requesting an extension of time within which to file objections to exhibits and the grounds therefor. In any event, such objections will be presented to the court in sufficient time prior to trial so as to enable to the court to make rulings on the exhibits in an efficient fashion.

(E) *Names and addresses of witnesses.*

Plaintiff's witnesses:

1. Enoch Toole
   P.O. Box 129
   Youngstown, FL 32466
2. William Jones
   904 Jeremy Lane
   Panama City, FL 32401
3. Linda Suggs
   1210 Illinois Avenue
   Lynn Haven, FL 32444
4. Fred Seyforth
   7 25th Street
   P.O. Box 216
   Apalachicola, FL 32320
5. Dennis Fuller
   503 Amy Street
   Lynn Haven, FL 32444
6. Robert Fuller
   3614 East Game Farm Road
   Panama City, FL 32401
7. Lorene Turner
   314 Liddon Place
   Lynn Haven, FL 32444

8. Barbara Thomas
   P.O. Box 484
   Southport, FL 32409

9. Ouida Burleson
   9734 Maple Ave.
   Youngstown, FL 32466

10. Ethelene Landrum
    1215 Carolina Avenue
    Lynn Haven, FL 32444

11. Joe Gainer
    1817 Georgia Court
    Lynn Haven, FL 32444

12. Judge Sorrells
    1328 Braircliff Road
    Dothan, AL 36303

13. Eddie Vaughn
    2917 Laurie Ave.
    Panama City Beach, FL 32407

14. Gary Morgan
    2817 Longleaf Road
    Panama City, FL 32405

15. Harry Sanders
    811 W. Pierson Dr.
    Lynn Haven, FL 32444

16. James Torrance
    211 Via de Luna Drive
    Pensacola Beach, FL 32561

17. Samuel L. Day
    P.O. Box 1444
    Lynn Haven, FL 32444

18. Barbara Day
P.O. Box 1444
Lynn Haven, FL 32444

Defendant's witnesses:

1. Don Horton
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
2. Stan LaRussa
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
3. Doug Harris
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
4. Mike Bryant
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
5. Tom Hamby
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
6. Jack Brown
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
7. John Livingston
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202

8. Bob Neill
   Liberty National Life Ins. Co.
   2001 3rd Avenue South
   Birmingham, AL 35202
9. Judge C. Stanaland
   Route 2, Box 710
   Crestview, FL 32936
10. Bill Newman
    1900 Liberty Lane
    Panama City, FL 32405
11. Bob Neiberger
    104 Kennesaw Lane
    Panama City, FL 32404
12. John Brooks
    1900 Liberty Lane
    Panama City, FL 32405
13. Inez McCall
    9523 Indian Bluff Resort Lane
    Youngstown, FL 32466
14. Joyce Wedge
    7213 Hiawatha St.
    Panama City, FL 32404
15. Andrea Brown
16. Don Pitts
17. Beverly Brewster
    612 Larson Building
    Tallahassee, FL 32399-0333
18. Donna Edgar
    315-B S. Palafox St.
    Pensacola, FL 32501
19. Carol Atkinson

20. Ed Scisson
612 Larson Building
Tallahassee, FL 32399-0333

21. David Daugherty
325 E. Sixth Street
Panama City, FL 32401

22. Dr. David A. Crown (expert)
3344 Twin Lakes Lane
Sanibel Island, FL 33957

23. Sibyl Gordey
706 Minnesota Avenue
Lynn Haven, FL 32444

Note: The parties reserve the right to seek permission to add witnesses to these lists in the event circumstances require it. Moreover, they reserve the right to call any witnesses listed by one another.

(F) *Admitted facts.*

1. Plaintiff is a citizen of the United States and a resident of Panama City, Florida.

2. Plaintiff was born on January 22, 1939.

3. Plaintiff was employed by defendant, Liberty National Life Insurance Company, from March 23, 1970, until his termination on May 8, 1991.

4. Defendant, Liberty National Life Insurance Company, is a foreign corporation licensed to do business in the State of Florida.

5. Defendant is subject to the Age Discrimination in Employment Act and was subject to the Act at all times since its enactment into law.

6. Defendant has been aware of the Age Discrimination in Employment Act for over 20 years and has

been aware that the Act prohibits discrimination against employees based on age.

7. At the time that defendant terminated plaintiff, he was 52 years of age and thus was entitled to the protections of the Age Discrimination in Employment Act.

(G) *Agreed issues of law.*

1. This court has jurisdiction over the parties and the subject matter of this dispute.

2. Plaintiff has fulfilled all of the conditions precedent to the institution of this action.

3. If plaintiff prevails, his remedies may include back pay, reinstatement or front pay, the value of perks, benefits, including increased retirement benefits, interest—including pre-judgment interest, attorneys' fees and costs.

4. If plaintiff proves that defendant willfully violated the Age Discrimination in Employment Act, he shall be entitled to liquidated damages. Top rove a willful violation of the Act, plaintiff must demonstrate that defendant knew or should have known that the Age Discrimination in Employment Act prohibited the actions alleged to have been taken against the plaintiff by the defendant, yet undertook such actions in reckless disregard of plaintiff's rights.

5. To the extent the law provides or permits, the prevailing party may be entitled to an award of reasonable attorney's fees and costs.

6. The Federal Rules of Civil Procedure and the Federal Rules of Evidence apply to this action.

(H) *Facts to be litigated.*

1. Whether or not defendant's actions and/or omissions violated plaintiff's rights under the Age Discrimination in Employment Act, and if so, whether such violation was willful.

2. Whether plaintiff sustained damages and the nature and extent of such damages.

(I) *Disputed issues of law.*

1. Plaintiff is unaware of any issues of law which remain for determination by the court.

(J) *Applicable rules of evidence and procedure.*

As noted in Section (G) above, the parties agree that the Federal Rules of Civil Procedure and the Federal Rules of Evidence apply to this action.

(K) *Outstanding motions.*

There are no outstanding motions which require action by the court.

(L) *Statement regarding jury trial.*

This action should be tried before a jury.

(M) *Mediation.*

Plaintiff's new counsel believes that mediation is an extremely valuable method of resolving disputes. He was not counsel when the court entered its order requiring mediation in March of 1995. Nor had he entered his appearance in May, when the court granted a 30-day stay with respect to its previous mediation order. As plaintiff's counsel understands it, the parties have never abided by the court's order referring this matter to mediation. Plaintiff's counsel recommends that Charles L. Cetti be selected as a mediator and that mediation be

required within 90 days. Ordinarily, plaintiff's counsel would seek an earlier mediation. However, his time is currently consumed in preparing for a complex case to be tried in Walton County before Judge Jere Tolton. The case, which involves claims of malpractice on the part of an architect and counterclaims for rights and freedoms protected by the Fourteenth Amendment and 42 U.S.C. §1983 involves hundreds of witnesses and nearly 1,000 documents. It is scheduled to begin on October 30, 1995, and is expected to take up the entire month of November.

Defendant's counsel and plaintiff's prior counsel moved the court for an order staying mediation based upon the parties' unwillingness to enter into any settlement. Defendant's counsel believes that mediation would be fruitless and that the parties will be unable to resolve this matter without a trial.

(N) *Length of trial.*

Both counsel believe that trial of this matter will consume three to five days.

Respectfully submitted this 18 day of October, 1995.

/s/ John Barry Kelly II
John Barry Kelly II
Florida Bar No. 140543
Ray, Kievit & Kelly
15 West Main Street
(32501)
P.O. Box 13490
Pensacola, FL 32591-3490
904/434-3527
Attorney for plaintiff

/s/ David C. Ashburn, by JBH
DAVID C. ASHBURN
Florida Bar No. 708046
Greenberg, Traurig,
Hoffman, Lipoff,
Rosen & Quentel, P.A.
101 E. College Avenue
P.O. Drawer 1838
Tallahassee, FL 32302
904/222-6891
Attorney for defendant

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

MCA 94-50124/RV

SAMUEL L. DAY,

Plaintiff,

vs.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

DEFENDANT'S TRIAL BRIEF

In accordance with this Court's Order of October 26, 1995, Defendant submits this Trial Brief setting forth the key facts and applicable law demonstrating that Defendant has not violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Section 621 et seq.

I. *Facts Demonstrating That Defendant Has Not Violated the ADEA in Discharging Plaintiff*

1. Defendant terminated Plaintiff's employment as insurance agent on May 9, 1991. Plaintiff's employment was terminated due to his unsatisfactory performance which included sales of insurance policies which resulted in Defendant being required to pay an excessive amount in claims as compared to premiums earned with respect to insurance policies sold by Plaintiff.

2. Plaintiff's performance as an insurance agent demonstrated that he was not qualified for the position from which he was terminated.

3. The reason for Plaintiff's termination is demonstrated, in part, by the losses sustained by Defendant on policies sold by Plaintiff during 1990. As of April 13, 1991, for health insurance policies sold by Plaintiff during 1990, Defendant was required to pay claims in excess of 2½ times the amount of premiums earned. Those excessive losses suffered by Defendant continued a trend of excessive losses established with respect to policies sold by Plaintiff during calendar years 1988 and 1989.

4. As of April 13, 1991, for health insurance policies sold by Plaintiff during 1988, Defendant was required to pay claims in excess of 2 times the amount of premiums earned.

5. In his Complaint, Plaintiff concedes that Defendant evaluated his performance as an insurance agent on the basis of a comparison of premiums earned versus claims paid.

6. Among the individuals who ultimately replaced Plaintiff was at least one individual who was older than Plaintiff.

7. Prior to and subsequent to the termination of Plaintiff's employment, Defendant has hired and continued to employ persons as insurance agents who are approximately Plaintiff's age and older.

8. Even if Plaintiff were able to establish a prima facia case for a violation of the ADEA, Plaintiff's unsatisfactory job performance and the losses Defendant suffered as a result of that unsatisfactory performance constituted legitimate non-discriminatory reasons for Defendant's termination of Plaintiff's employment.

9. Defendant's reasons for its termination of Plaintiff's employment were not a pretext for age discrimination.

II. *Law Applicable to Defendant's Claims*

10. Plaintiff's claim in this case is based solely upon an alleged violation of the ADEA.

11. To establish a prima facia case which would permit recovery under the ADEA, Plaintiff is required to prove:

> (1) That he is a member of the protected group;
>
> (2) That adverse employment action was taken against him;
>
> (3) That he was replaced by a person outside the protected group; and
>
> (4) That he was qualified for the position for which he was rejected.

Bell v. Desoto Memorial Hospital, Inc., 842 Fd.Supp 494, 497 (M.D. Fla. 1994) (citations omitted).

12. As demonstrated above, Plaintiff cannot establish the third and fourth elements of a prima facia case as established in the *Bell* decision.

13. Even if Plaintiff were able to establish a prima facia case of age discrimination, his claim in this case must fail since Defendant's termination of Plaintiff's employment was based upon legitimate, non-discriminatory reasons.

14. As noted by the *Bell* court,

> Once a legitimate, non-discriminatory reason for dismissal is put forward by the employer, the burden returns to the Plaintiff to prove by significantly

probative evidence that the proffered reason is a pretext for discrimination.

Id. at p. 498 (citations omitted).

15. Since Defendant's reasons for its discharge of Plaintiff were pretextual, Plaintiff's claim must fail.

16. Should Defendant be found to have violated the ADEA in discharging Plaintiff, Plaintiff's recovery must be limited to lost wages and benefits. See, *Maleszewski v. United States*, 827 F.Supp. 1553, 1556 (N.D. Fla. 1993). Moreover, any award of equitable relief (e.g., front page) should be determined by the Court rather than the jury.

17. Plaintiff's entitlement to liquidated damages is dependent upon proof that Defendant willfully violated the ADEA in discharging Plaintiff. Such a willful violation may be found only where it is determined that Defendant discharged Plaintiff when it "knew or showed reckless disregard for the matter of whether its conduct was published by the ADEA". *Castle v. Sangamo Weston, Inc.*, 837 F.2d 550 (11th Cir. 1988).

Respectfully submitted this 2nd day of November, 1995.

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891

/s/ David C. Ashburn
DAVID C. ASHBURN
Fla. Bar No. 708046

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail John Barry Kelly, Esq., Ray, Kievit & Kelly, 15 W. Main Street, P.O. Box 13490, Pensacola, FL 32591-3490 this 2nd day of November, 1995.

/s/ David C. Ashburn
DAVID C. ASHBURN

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Case No. 94-50124-RV

SAMUEL L. DAY,

Plaintiff,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

SPECIAL VERDICT

WE, THE JURY, in the above-captioned cause, find the following Special Verdict:

1. Do you find, by a preponderance of the evidence, that age was a determining factor in the Defendant's decision to terminate Plaintiff?

Answer "Yes" or "No".

YES: _____ NO: _____

(If you have answered "Yes", then answer Question No. 2. If you have answered "No", then do not answer any of the other questions, and have your Foreman sign and date this form.)

2. What amount of back pay and compensatory damages do you find that the Plaintiff is entitled to receive?

Amount: $ _____

(Proceed to Question No. 3.)

3. In terminating the Plaintiff, do you find that the Defendant "willfully" violated the Age Discrimination in Employment Act, as the term "willful" was defined for you in the Court's instructions?

Answer "Yes" or "No".

YES: _____ NO: _____

(If you answer "Yes", the Court will double the amount of damages you found in Question No. 2.)

SO SAY WE ALL.

DATED this _____ day of March, 1996.

_____

Foreman

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Civil No.: 94-50124-RV

SAMUEL L. DAY,

Plaintiff,

vs.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

EXCERPTS FROM TRANSCRIPT OF
THIRD DAY OF TRIAL
BEFORE THE HONORABLE ROGER VINSON
UNITED STATES DISTRICT JUDGE, and a jury.

Panama City, Florida
March 27, 1996
8:45 A.M.

* * *

[64] Subject to that, anything else to come before the Court from either side?

MR. KELLY: Nothing for the plaintiff, Your Honor.

MR. ASHBURN: Yes, Your Honor. It's a legal matter that I don't know if we need to take up in front of you or not, based on the verdict that was rendered,

Your Honor, based on the answer to Question 3, and the timing of the bringing of this action.

THE COURT: I'm not sure I understand what you mean.

MR. ASHBURN: Your Honor, as a matter of law, the this action was not brought within two years; and, therefore, under the statute, for the defendant (sic) to recover any amount of monies, he had to prove that the discrimination was willful. The jury has rendered a verdict that the [65] discrimination was not willful.

THE COURT: We'll take that up, then. I'm not sure that I understand your ramifications of what you are telling me, but we'll take that up in just a moment. I'll let the jury go home.

All right, ladies and gentlemen, we are going to excuse you, and you're free to go. If you need something for your employer to prove that you've been on federal jury duty, if you've asked for it, I think we have those ready and waiting for you.

So, we'll excuse the jury, and we'll be in recess for about ten minutes. We'll come back in and take up this matter.

(A recess was taken from 1:58 p.m. to 2:04 p.m.)

(Parties present.)

THE COURT: Take seats. We have the parties and lawyers here. Mr. Ashburn, tell me what the problem is.

MR. ASHBURN: Yes, Your Honor. Under the statute that the plaintiff has brought his claim, it provides that, if he had filed his action within a certain two-year time frame, then he would be entitled to recover on the findings as we find them in the first two questions. It also provides, however, that, if the claim was not brought within those two years, but it was brought within a three-year period, which this one made it in within

a matter of days—[66] it was made within the three-year period—that he can only recover if there's a finding that the discrimination is willful.

The jury specifically found on their third item that this was not a willful discrimination; therefore, under that statute, we don't believe he can recover anything.

THE COURT: All right. Mr. Kelly?

MR. KELLY: I don't think that is accurate; but, at this stage, I'm not prepared to argue to the Court.

THE COURT: All right. Well, I'm going to let you both submit a memorandum on it, and you can do it simultaneously. I'll give you—let's do it quickly. I'll give you a week from today. So, that ought to be enough time. It ought to be a pretty simple issue, whatever it is. I haven't even realized, I guess, that there was a distinction between the two-year and three-year statute of limitation.

MR. KELLY: There is in terms of damages, Your Honor, that I'm aware of, but not in terms of filing. But, at any rate, we'll find out.

THE COURT: Well, brief it for me, and then I'll make a decision on the matter; and we'll see what else, if anything, we might do.

* * *